United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1229

74-1229

To be argued by
Angelo T. Cometa

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 74-1229

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

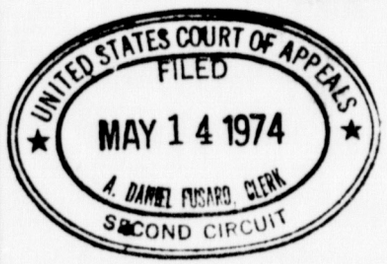
-against-

ARTICLES OF JEWELRY and WEARING APPAREL
and HARRIET SENZ,
Defendant-Appellee
Cross-Appellant,

IRA SENZ,
Claimant-Intervenor
Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT-APPELLEE



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BRIEF FOR THE DEFENDANT-APPELLEE

STATEMENT

This brief is submitted on behalf of Harriet Senz, defendant-appellee, in opposition to the plaintiff-appellant's (sometimes herein referred to as "the government") appeal from a judgment of the United States District Court for the Eastern District of New York (Mishler, Ch. J.) entered on September 21, 1973. This submission is also made in support of defendant-appellee's cross-appeal against her husband Ira Senz, claimant-intervenor below, to the effect that,

should any portion of the judgment appealed from be reversed, the cross-appellee Ira Senz is responsible for any penalties and/or forfeiture incurred and should be directed to discharge his obligations therefor.

The preliminary statement and statement of facts set forth in the government's brief summarizes the chronology of this litigation and, in some detail, recites portions of the evidence adduced in the course of two days of trial before Chief Judge Mishler. Accordingly, defendant-appellee dispenses with such recitations and will advert to evidentiary details only where relevant to amplify her argument below.

ARGUMENT

1. Contrary to several assertions by the government which would make it appear to be so, this is not an action solely in personam to collect duties which the government alleges have not been paid. The government has sought from the outset, the harsh remedy of forfeiture of goods which is an in rem remedy.

2. The in rem burden is totally inequitable and inappropriate in the instant case not only by virtue of the

government's failure to prove that lawful duty was never paid on the goods in question but also because the forfeiture is sought against property in the hands of a donee-wife and where the record shows that the property has been brought in and out of the country for many years.

3. In cases where the governemnt seeks to impose the harsh in rem forfeiture burden upon a donee-wife such as defendant-appellee who has traveled to Europe and returned to the United States regularly with the jewelry given to her by her husband in the course of their lengthy marriage, the burden is upon the government to prove that the goods sought to be forfeit are dutiable items in the first instance. In rem forfeiture is only one of the ways the government has available for the collection of duty. Assuming this matter were just an action to collect duty, no one would deny that the government must have the burden of showing that (a) these were dutiable goods; and (b) the lawful duty was not paid. It follows a fortiorari, that in an in rem case, the government's burden is much heavier. The burden is all the more enhanced when, as in the instant case, the forfeiture sought would work an irretrievable hardship upon the donee-wife. The government totally failed to assume its

lawful burden, resting instead upon its erroneous assertion that an American citizen has the duty to declare all goods acquired abroad, no matter when they were acquired, irrespective of how they were acquired, notwithstanding prior declaration and without a clear showing that the goods were dutiable at the time of seizure - and that a failure to so declare not only subjects the individual to the in personam penalty but to the harsh in rem forfeiture penalty as well. In characterizing the government's contentions and bringing these to their logical conclusion, the Court below stated that: "Plaintiff's argument in essence is that the customs regulations require returning residents to declare all of their duty-free personal effects, including toothbrushes and bobby pins, or face the consequences of [19 U.S.C.] Section 1497." (A-32)* The absurdity of such a state of affairs could never have been contemplated by the legislature.

4. In the event that the evidence sustains a finding that lawful duty was never paid on any of the items, defendant-appellee contends that such duty should be paid by her husband, the claimant-intervenor, who is the donor-

*References are to page numbers in the Joint Appendix.

importer of the goods. Payment of duty is patently a "necessary" for which an obligation clearly flows to the husband.

5. Finally, on the issue of notice, it is interesting to reflect upon the purpose and intent underlying the fact that in the time since the seizure of the items in question on September 11, 1968, the government has substantially changed the wording of Customs Form 6059-B.

I

THE DISTRICT COURT CORRECTLY HELD THAT IN THE CIRCUMSTANCES PRESENTED, THERE WAS NO OBLIGATION UPON THE DEFENDANT -APPELLEE TO DECLARE THE SEIZED ARTICLES UPON ENTRY INTO THE UNITED STATES ON SEPTEMBER 11, 1968.

The government has failed to prove each and every element required for forfeiture under 19 U.S.C. §1497. Under the statute, the governemnt has three burdens of proof:

1. The government must prove that the defendant-appellee had an affirmative duty to declare the seized articles, and that she failed to do so.

2. The government must prove that the seized articles were subject to the payment of duties on the occasion in question.

3. The government must prove that the defendant-appellee was personally liable for the payment of such duty.

The absence of any one of these elements would defeat the government's claim. The government failed to prove any of them because it had no such proof. The defendant-appellee went forward to affirmatively prove the absence of all three vital elements in the course of her trial in the District Court.

The government attempted to obtain by forfeiture, jewelry previously seized under the provisions of 19 U.S.C. §1497 which reads as follows:

> "Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry were not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article." (Emphasis supplied)

A reading of §1497 clearly indicates that in order to take the goods by forfeiture, the government must prove that they were required to be declared upon entry. Otherwise, the section would have no meaning -- surely it

does not relate to goods which are not required to be declared, nor can it reasonably be contended that a person would be personally liable to the severe penalty of forfeiture if that same person did not have the personal obligation to make the declaration.

The evidence clearly shows and it is conceded that defendant-appellee received the jewelry in question as gifts over a period of many years prior to the seizure. The District Court found that claimant-intervenor "failed to establish any right to any of the items..." (A-35) These jewels were personal effects of the defendant-appellee and she constantly traveled abroad and returned with them. They were imported and re-imported into this country and were declared by her husband on occasions prior to the entry of September 11, 1968.

Title 19 §10.17(a) of the Code of Federal Regulations, entitled "Personal and Household Effects Taken Abroad," states:

> "Each returning resident is entitled...to bring in free of duty and internal revenue tax all personal and household effects which he took abroad."

19 C.F.R. §10.19(c)(1) provides that "effects of a returning resident entitled to free entry under item...

813.10, Tariff Schedules of the United States..., need not be itemized in written declarations." Item 813.10 is a reiteration of Sections 8.2(a) and 10.17(a) of 19C.F.R. to the effect that all personal and household effects taken abroad by or for the account of returning residents are duty free upon importation.

By any standard, therefore, the jewelry cannot be considered to constitute goods which required declaration. They were the personal property of the defendant-appellee which had been declared at some date or dates prior to entry of September 11, 1968 and which had been re-imported perhaps a dozen or more times in the years between purchase and seizure. The District Court rightly found that "personal effects" may be construed to cover personal jewelry, citing United States v. One Diamond and Platinum Brooch, 86 F. Supp. 329, 330 (N.D.N.Y. 1949). (A-31).

It should be noted that the government has totally failed to rebut the evidence adduced by the defendant-appellee to the effect that the jewelry had been previously declared and duty paid thereon. (A-61)

Proof of the negative might have been adduced by the government by obtaining an appropriate certification from the custodian of customs records. See Rule 44(b) F.R.C.P. The

government chose to sit still and do nothing. Even more curious and, again, relating to the government's misplaced reliance upon its interpretation of the statutes involved, the government could have insisted upon the appearance of the claimant-intervenor who, while not having been named as a party, intervened in the action. Defendant-appellee, the donee-wife, having rebutted all legitimate presumptions that might have been weighed against her, the government failed to insist on the production of Ira Senz, the donor-importer, preferring to go after the donee.

The government's second burden of proof is an affirmative duty to show that the seized articles were subject to the payment of duties on September 11, 1968.

In this regard, it is important to refer to 19 U.S.C. §1496 which states:

> "The collector may cause an examination to be made of the baggage of any person arriving in the United States in order to ascertain what articles are contained therein and whether subject to duty, free of duty, or prohibited notwithstanding a declaration and entry therefor has been made." (Emphasis supplied)

This section serves two functions, one of which is beyond dispute. There is no doubt that the collector

has the right of examination even in the face of a declaration. The examiner must test the accuracy of the declaration to determine whether the traveler seeks to conceal something not declared which should have been declared or perhaps that something has been declared which need not have been. §1496 empowers the collector to determine whether the goods are subject to duty or "free of duty." It follows that if the goods are "free of duty" they are not subject to the payment of duty irrespective of whether or not the goods have been declared.

The government has sought (illogically) to connect the right to inspect, which is beyond dispute, with an obligation to declare goods whether or not they are duitable (page 6 of plaintiff-appellant's brief). However, a more serious misconstruction of the issues presented to this Court is to be found in the government's assertion that articles having illegally entered the country, they would "forever escape collection of duties" (page 8 of plaintiff-appellant's brief). Certainly this is not defendant-appellee's contention. The government has confused the in personam penalty remedy (duty will always remain payable) with the in rem forfeiture remedy. On page

9 of plaintiff-appellant's brief, this serious error is repeated when it is stated that Judge Mishler's construction of the regulation would mean that, "Customs would in effect be forever estopped from collecting...duty." Having made this statement, it is incomprehensible that the government would go on to state the fact - as contended by both defendant-appellee and Judge Mishler that the government never waives the right to collect lawful duty (page 9 of plaintiff-appellant's brief).

As the Court below pointed out (A-34) in discussing the applicability of the statutes in question, in one case which granted forfeiture, the clear implication was that this sanction was applied only because the jewelry in question was dutiable. United States v. 3 Diamond Rings (Ladies), 108 F.Supp. 374 (N.D. Cal. 1952). Nor can the government take any comfort from a case cited in plaintiff-appellant's brief, One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972). Indeed, the government's citation (page 7 of plaintiff-appellant's brief) begs the question when it proposes that "the government need only prove that the property was brought into the United States without the required declaration..." (emphasis added). It is the very element of "required" that is at issue here. In One Lot,

the Supreme Court states that the forfeiture penalty "prevents forbidden merchandise from circulating in the United States" and, as the District Court pointed out herein, "thus aids the enforcement of tariff regulations." (A-34) Judge Mishler further commented: "Duty free articles are not forbidden merchandise," and failure to declare them is not penalized by Section 1497.

Title 19, §10.17(a) C.F.R. is clearly applicable since, by its terms, the personal jewelry of defendant-appellee was exempt from the payment of duty under the circumstances presented. Defendant-appellee's baggage contained jewelry which was clearly "free of duty." She, therefore, had no obligation to declare the goods and there can be no right of the government to take by forfeiture.

Even though the defendant-appellee has offered evidence of such prior payment which stands unrebutted, it is urged that §1017 be strictly construed. The strict construction rule relating to Customs Acts must be religiously adhered to. In United States v. Claybourn, 180 F.Supp. 448 (S.D. Cal. 1960), the defendant was charged with smuggling goods into the country which he had previously taken out of the country. It was held:

> "It is immediately apparent that where the facts show without dispute that a defendant took the same goods out of the country and thereafter brought them back into the country, that he was not smuggling or clandestinely introducing goods into the United States." 180 F.Supp. at 451.

The government has the burden of proving that it was duly authorized under the facts presented to withhold and confiscate goods, for failure to pay lawful duties. There are a number of cases to the effect that laws of this nature are to be strictly construed against the government and in favor of the importer. Thus, in Matheson & Co. v. United States, 71 F.394, 395-96 (2d Cir. 1896), the Court held that in cases of doubt in the construction of Customs Acts the Courts resolve the doubt in favor of the importer. Equally significant is Rece v. United States, 53 F. 910 (8th Cir. 1893) in which it was held that:

> "In every case of doubt such statutes must be strictly construed against the government."

And, in Erskine v. United States, 84 F.2d 690, 691 (9th Cir. 1936):

> "Such revenue acts must be construed strictly in favor of appellant sought to be charged as importer. He is entitled to the benefit of even

a doubt."

The government also failed to prove that the goods upon which forfeiture was sought were imported by the person who had a duty to declare them upon entry and that the goods were in fact subject to duty not actually paid, and that the party obliged to declare them also was required to pay duty thereon.

Thus, in United States v. Koblitz, 16 Fed. 900, it was stated:

> "The burden of the proof is on the government to show that the defendant did import woolen rags without the payment of the duty required to be paid by the statute...This must be done by a fair preponderance of evidence." (at 901).

And further:

> "If the rags were purchase by the defendant, after they had been imported and passed the custom-house, without the payment of duty, by others, he is not liable for the duty, unless he connived at, and is shown to be privy to, the importation, and so passing them without payment of duty. The fact that dutiable goods were allowed by the government officers to pass through the custom-house without the payment of the duty thereon required by law, does not relieve the persons who import them from the payment of such duty and the government has a right by action to recover such duty." (at 901-902)

In the instant case, defendant-appellee testified that all eight items were gifts: seven from her husband, and one from a business associate of her husband. All of the jewels were re-imported into the country -- in most cases, many times, on returning from her frequest trips abroad. As to re-imported goods, it is the government's burden to show on the issue of forfeiture, that despite these prior importations, the government's right to seizure (as distinguished from its right to the payment of duty) remains inchoate and that its failure to seize goods at the time of the first importation does not relegate it solely to an in personam action.

The government has cited no case to justify its right of forfeiture subsequent to the date of the first importation and after the goods have entered the United States. The government clearly lost its right to take the goods by forfeiture.

The government should not be heard to say that it has proved its case by a mere showing that defendant-appellee entered the country without declaring the items in question. Forfeiture of goods requires a great deal more proof than that. To rule in the government's favor would be to hold that an American citizen is under a continuing duty to

declare personal effects acquired abroad each time she returns home, notwithstanding any prior declarations or re-importations under penalty of seizure, forfeiture and divestiture of property interests - merely because the articles still had the marks of foreign manufacture.

When a presumption is rebutted, it no longer exists. Wallington Apts. v. William Miller, 288 N.Y. 31 at p. 33; 141 A.L.R. 1036; Richardson on Evidence (7th Ed.) pp. 32 and 33. Defendant-appellee rebutted the presumptions originally made by the government. At that point, the burden shifted. the government failed to assume its burden (as pointed out above, it refused to call Ira Senz to the stand and did not exert the minimal effort required to produce an official custodian of customs' records).

II

SHOULD THIS COURT CONCLUDE THAT THE EVIDENCE SUPPORTS A FINDING THAT LAWFUL DUTY WAS NEVER PAID ON THE GOODS, THE CLAIMANT-INTERVENOR, AS DONOR-IMPORTER, SHOULD BE DIRECTED TO PAY SUCH DUTY.

The jewelry in this case had been previously imported into the United States on numerous occasions. As previously stated, it is not claimed that the government is not entitled to lawful duties in the event it has proved that duties

were never paid. It is, however, the defendant-appellee's contention that under the circumstances presented in this matter, the jewelry may not be seized. The in personam remedy of collecting duty remains if the government has proved that lawful duty remains uncollected. It is submitted that the government has not met even this burden. Assuming, arguendo, that it had, the in personam remedy lies as against the importer who in this case is the donor, Mr. Senz (except for the coral ring) and not the donee, defendant-appelle. The obligation to pay duties, if any are actually due, rests clearly on the claimant-intervenor. 19 C.F.R. §10.17(c) provides:

> "An article acquired abroad by a returning resident and imported by him to be disposed of after importation as his bona fide gift is for the personal use of the importer."

It follows logically then that if a donor gives a gift abroad and then comes into the United States with the donee, the donor and not the donee is liable for the duties.

In the instant case, defendant-appellee is no different than any other wife. When her husband gave her jewelry -- irrespective of where the gift was made, she treated it as another wife would treat it: as a gift without any strings attached to it and without any obligation whatever.

Defendant-appellee had no reason to believe at any time that she had an obligation to pay duties upon items of jewelry which had been given to her by her husband and which had been taken into and out of the country for years prior to the seizure.

As a bona fide donee, the defendant-appellee would have to be shown to have connived with her husband, the donor-importer, to deprive the government of lawful duties in order to work the forfeiture sought, Koblitz.

It is axiomatic that a husband is primarily responsible for necessaries provided to his wife according to their station in life. This obligation is to be measured with a view and regard to the husband's pecuniary ability and general econimic resources. Kearns v. Manufacturers Hanover Trust Co., 272 N.Y.S.2d 535, 51 Misc.2d 34; Merlino v. Merlino, 227 N.Y.S.2d 262, 33 Misc.2d 462. A husband who fails to provide his wife with necessaries suitable to their condition can be held primarily liable therefor, even though they were provided at the sole instance and request of the wife, and notwithstanding she may have private means. Grishaver v. Grishaver, 225 N.Y.S.2d 924. The husband's paramount obligation to support his wife may be enforced by her direct action for reimbursement where she has been

compelled by the huband's default to pay for necessaries out of her separate estate. York Towers Inc. v. Bachmann, 341 N.Y.S.2d 5, 73 Misc.2d 214. In the instant case, claimant-intervenor gifted his wife quantities of jewelry from the inception of their marriage. Surely it follows that any obligation to pay duty upon the importation of jewelry into the United States falls upon the husband, the donor-importer. The payment of duty is clearly a necessary for which the husband is primarily liable.

III

THE FACT THAT THE GOVERNMENT HAS SUBSTANTIALLY REVISED THE CUSTOMS DECLARATION,(FORM 6059-B) SINCE THE SEIZURE OF DEFENDANT-APPELLEE'S JEWELRY, CLEARLY UNDERSCORES THE LACK OF DUE AND SUFFICIENT NOTICE.

In the judgment appealed from, Judge Mishler stated his concern about two crucial factors relating to the issue of notice to defendant-appellee. First, the Customs form instructed her to declare only "articles acquired abroad" (A-24, A-32); and second, the Customs Inspector asked her only whether she had "purchased any items abroad during her recent trip" (A-32).

The Customs declaration used by defendant-appellle on September 11, 1968 was one adopted in 1966 and directed

each arriving traveler to declare "all articles acquired abroad..." (A-24). Contrast this simple direction with the new instructions promulgated in Form 6059-B adopted July, 1971 (a copy is attached as Exhibit A):

> "...the laws of the United States require that you declare ALL articles acquired abroad (whether worn or used, whether dutiable or not, and whether obtained by purchase, as a gift, or otherwise)..."

Even the new form presents problems of interpretation. But one thing is certain: in 1968, when defendant-appellee entered this country with pieces of personal jewelry which she had owned for years and which were acquired as gifts over a period of 10 to 12 years prior to seizure, the form used was a simple and fairly uninstructive one. Had she been given a form similar to that in use today, she might well have declared every piece of jewelry. The government clearly recognized the inadequacy of the notice contained in the form in use in 1968. The result is a new form, the benefit of which defendant-appellee was denied.

This fact, when coupled with the Inspector's nebulous inquiry (supra) clearly point to a lack of due and sufficent notice to defendant-appellee.

C O N C L U S I O N

The judgment of the District Court should be affirmed

and the government should be directed to immediately return to the possession of defendant-appellee, all of the jewelry which the government seized on September 11, 1968. Should this Court conclude that the evidence supports a finding that lawful duty had not been paid on any of the jewelry - a finding which defendant-appellee submits is not supported by any evidence - then it is urged that the claimant-intervenor, cross-appellee be directed to pay such duty as the donor-importer under relevant statutory law and on the theory that duty being a necessary, claimant-intervenor, as the husband of defendant-appellee, is primarily liable for payment.

Respectfully submitted,

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Attorneys for Defendant-Appellee Harriet Senz

By: Angelo T. Cometa
A Member of the Firm

Of Counsel,

ANGELO T. COMETA

U.S. CUSTOMS DECLARATION

Present to the Immigration and Customs Inspector

EACH ARRIVING TRAVELER OR HEAD OF A FAMILY MUST WRITE IN THE FOLLOWING INFORMATION

Please Print:

FAMILY NAME	GIVEN NAME	MIDDLE INITIAL

DATE OF BIRTH *(Mo./Day/Year)*	VESSEL, OR AIRLINE & FLT. NO.

NON-CITIZENS ONLY→	U.S. VISA ISSUED AT *(Place)*	VISA DATE *(Mo./Day/Year)*

CITIZEN OF *(Country)*	RESIDENT OF *(Country)*

PERMANENT ADDRESS IN UNITED STATES OR ABROAD

ADDRESS WHILE IN THE UNITED STATES

NAME & RELATIONSHIP OF ACCOMPANYING FAMILY MEMBERS

ARE YOU OR ANYONE IN YOUR PARTY CARRYING ANY FRUITS, PLANTS, MEATS, OTHER PLANT OR ANIMAL PRODUCTS, OR PETS? YES ☐ NO ☐

I certify that all statements on both sides of this declaration are true, correct and complete.

SIGNATURE:

In addition, the laws of the United States require that you **declare ALL articles acquired abroad** *(whether worn or used, whether dutiable or not, and whether obtained by purchase, as a gift, or otherwise)* which are in your or your family's possession at the time of arrival.

Nonresidents may make an oral declaration. **Returning Residents** may make an oral declaration if the total value of articles declared *(price actually paid or, if not purchased, fair retail value)* is not more than the sum of $100 per person. Otherwise **You Must List In Writing On The Reverse Of This Form All Articles Acquired Abroad Which You Are Now Bringing Through Customs.**

All your baggage *(including handbags and hand-carried parcels)* may be examined. **False Statements Made To An Inspector Are Punishable By Law.** Consult "U.S. Customs Hints" and your inspector for full information.

FOR OFFICIAL USE ONLY

NO. PIECES BAGGAGE EXAMINED	TIME COMPLETED	STAMP NOS.

INSPECTOR	
DATE	BADGE NO.

The Department of the Treasury
Bureau of Customs

CUSTOMS FORM 6059-B
JULY 1971

FORM APPROVED
OMB NO. 48-R0386

by A

COPY RECEIVED 3:11 PM 5/14/74
AUSTRIAN CAWCE + STEWART PC